Filed 7/27/10 P. v. Young CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW CHRISTOPHER YOUNG, Defendant and Appellant.	B214278 (Los Angeles County Super. Ct. No. LA044097)

APPEAL from the judgments of the Superior Court of Los Angeles County. Michael A. Latin, Judge. Affirmed in part, reversed in part, and remanded.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Andrew Christopher Young (appellant) of aggravated mayhem (Pen. Code, § 205)[1] (count 2); second degree robbery (§ 211) (count 4); carjacking (§ 215, subd. (a)) (count 5); kidnapping for carjacking (§ 209.5, subd. (a)) (count 6); kidnapping (§ 207, subd. (a)) (count 7); and false imprisonment by violence (§ 236) (count 8).

After denying appellant's motion for a new trial, the trial court sentenced him to two consecutive terms of life with the possibility of parole in counts 2 and 6. In counts 4 and 5, the trial court imposed consecutive terms of one year and five years, respectively. The trial court stayed the sentences in counts 7 and 8 under section 654.

Appellant appeals on the grounds that: (1) he was denied due process and a fair trial because his conviction in count 6 rests on insufficient evidence; (2) as an alternative to the previous argument, count 6 must be reversed due to prejudicial instructional error that lessened the prosecution's burden of proof and denied appellant due process and a fair trial; (3) if count 6 is not reversed, appellant's convictions in counts 5 and 7 must be reversed, since they are lesser included offenses of kidnapping during a carjacking; (4) appellant's conviction for false imprisonment in count 8 must be reversed and dismissed because it is a necessarily included offense of kidnapping; (5) the trial court's erroneous instruction on mayhem lessened the prosecution's burden of proof and deprived appellant of due process and a fair trial, requiring reversal of count 2; (6) appellant was denied due process and a fair trial because the prosecutor committed incurable misconduct during closing argument, requiring reversal; (7) the trial court abused its discretion and undermined appellant's presumption of innocence by allowing a sheriff's deputy to stand between appellant and the jury when appellant testified at trial; and (8) the number of presentence custody credits granted appellant must be corrected.

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1 All further statutory references are to the Penal Code unless otherwise indicated.

FACTS

At approximately 8:30 p.m. on September 27, 2003, Jorge Pena (Pena), who worked for Pizza Hut, arrived at 15215 Victory Boulevard to deliver a pizza to apartment No. 201. Pena parked his car and called appellant, who had ordered the pizza, on his cell phone. Pena could not otherwise enter the building, since the intercom system was not functioning for apartment No. 201. Appellant went out on his balcony and told Pena to enter the building through a side entrance. Pena proceeded to apartment No. 201 on the second floor. Pena saw another young man standing in the hallway. The man was standing at the door across the hall from No. 201 as if he were waiting to be let in. This man was later identified as Eugene Harris (Harris).[2]

The door to apartment No. 201 was open. Pena remained in the doorway. Pena saw appellant inside the apartment and told him the price of the pizza. Appellant touched his pockets and told Pena to wait a minute. He then walked around the apartment as if looking for money.

Pena suddenly felt a hand around his neck and realized he was in a headlock. Pena saw a knife in his attacker's right hand, which was dark-skinned. Pena's neck was held very tightly. Pena begged to be let go and said that he had some money and his car keys. The attacker pushed Pena into the apartment. Pena told his attacker he could not breathe, and then he fainted. Pena did not notice if appellant was in the apartment, but he did not see him leave.

When Pena awoke he was lying in the living room, and he saw both appellant and Harris. He had been jolted back to consciousness by the pain of a burn on his stomach that had been made with a hot iron. Pena saw Harris holding the iron, and appellant was there next to him. Pena saw blood dripping from a cut in his right wrist. Harris told Pena not to try anything stupid because Harris wanted to kill him. Harris repeated this threat while holding the hot iron near Pena's face. Appellant also made threats, saying that he

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[2] Harris was tried along with appellant, but Harris decided to enter a guilty plea to all charges during appellant's direct testimony.

had a gun and if Pena did anything stupid he would shoot Pena and go to the Pizza Hut store and shoot everyone there.

Appellant then left the apartment while Harris stood guard over Pena. Appellant returned after a few minutes and asked Harris if he knew how to drive a stick shift because appellant could not. Pena's car was a stick shift. Harris left the apartment while appellant stood guard over Pena.

While Harris was away appellant told Pena that he used to like Mexicans until some Mexican did the same to him that appellant was doing to Pena. Appellant said, "I'm sorry, but I have to do this," and "God bless you." Pena did not hear appellant ask Harris to leave, and appellant rejected Pena's offer of money in exchange for letting him go. Appellant did not seem to be trying to help Pena escape. Appellant held his foot to Pena's chest during the time Harris was out.

When Harris returned, appellant and Harris helped Pena stand up. One of the two men gave Pena a towel for his neck. Pena believed the towel was placed to cover something. The two men took Pena outside through the same door he had entered. Harris held onto Pena's elbow and held a knife in his other hand. Appellant walked about two feet in front of them. When appellant got to the door, he looked around. Pena walked out the door, and he saw that his car had been moved up to that entrance. Pena was told to get in the trunk of his car. Pena begged the men, "Please, don't do this. Let me go [in the back seat], I won't do anything." Appellant and Harris did not relent, and Pena got into the trunk. Appellant and Harris drove the car carrying Pena in the trunk for approximately 20 minutes. Pena heard them change the radio station as soon as the car started. The two men conversed and there was laughter sometimes.

The car stopped and parked. Another car drove up next to Pena's, and Pena heard a male voice say, "He is in the trunk." A woman replied, "Oh, yeah." The other car then drove away. Pena heard the two doors of his car closing. He waited for five or 10 minutes before attempting to escape. Because Pena's trunk had been damaged in an accident, Pena was able to open it from the inside. Pena left the car and looked for help.

He eventually was taken to Northridge Hospital. Pena was treated for great bodily injuries caused by a knife, burning, and strangulation, and he underwent surgery.

Pena was interviewed by police, who conducted an investigation. On the following day, members of the Los Angeles Police Department arrested and searched appellant and Harris. Officers returned Pena's cell phone and car keys to him. Police found Pena's cell phone in Harris's possession. Pena's keys were found in appellant's possession. Pena identified appellant and Harris in photographic lineups.

Defense Evidence

Appellant testified that he was 16 years old when the crimes against Pena occurred, and he had been living with his older brother Phillip for several months. Appellant, Phillip, and their father had slept on the streets during appellant's childhood. Harris had also been staying at Phillip's apartment for several days. Harris was a good friend from appellant's old neighborhood in South Central Los Angeles. Appellant had offered Harris a place to stay because Harris had been living on the sreets.

Between 3:00 and 4:00 p.m. on September 27, 2003, appellant ordered a pizza at Pizza Hut. Later that evening, Harris said he was hungry again, and appellant ordered more pizza. Harris said he would pay for it. When the pizza arrived, appellant told Pena to come upstairs, but appellant did not know where Harris was at that moment. Pena knocked on the door and asked for payment when appellant responded. Harris then appeared behind Pena, and appellant asked him to pay. Harris put Pena in a chokehold and placed a knife to Pena's throat. Harris wrestled Pena to the living room floor. Appellant panicked and closed the door.

Because of his panic, appellant began to kick at Harris to break up "the situation." Appellant accidentally kicked Pena. While Harris and Pena were on the floor, Harris sliced Pena's throat two times. When appellant saw the blood, he did not know if he "was going to be next." He ran into his brother's bedroom.

Appellant testified that he had seen blood like that years before. His father beat him and everyone in their household. Appellant's mother abandoned the family because

of the beatings. At the age of 12, he went to live with his grandmother. At that time, in 1999, he had a half-sister named Wilma who also lived in the grandmother's house. One day his father showed up at their home. Appellant fell asleep watching television and awoke to see his sister pushing a toy into his father's knees as his father lay on the floor. Appellant's father hit Wilma on the head with a hammer, and there was blood everywhere. Appellant ran outside and sat under a tree for hours. His father eventually came out and said, "Come on." He told appellant he had to take the blame for Wilma. Appellant confessed to hitting Wilma to police. Eventually Detective Paul Fournier (Detective Fournier) coaxed the truth from appellant, who had to testify against his father.

Appellant thought that Pena was dead because of all the blood he had lost. Therefore, appellant stayed in the bedroom for 10 or 15 minutes. He did not call for help because he thought his life would end if Harris caught him. Music was playing, and then the music stopped and the room outside became silent. Appellant prayed that Harris was gone, and he stepped out of the bedroom. He grabbed a towel to help Pena, just in case he was alive. Pena appeared to be waking up, and appellant put the towel around his neck. Appellant did not run away because he felt there was no escape. He felt he was in a situation like the one he had been in with his father, and he felt traumatized.

Appellant told Pena "God bless [you]" and that he was sorry this situation occurred. He did not tell Pena that he used to like Mexicans until they did the same thing to him. Appellant did not threaten to use a gun on Pena and his coworkers. Appellant did not know anything about the burning with the iron until the detectives told him about it.

After appellant was alone with Pena for a few minutes, Harris returned. Harris told appellant, "Come on" in a demanding way. These were the exact words appellant's father had used when he came to get appellant after murdering appellant's sister. Appellant followed Harris because he did not want to make him even angrier than he was. Appellant thought Harris would do the same to him that he had done to Pena.

Harris grabbed Pena and walked out of the apartment with Pena while holding a knife in Pena's ribs.

Appellant never told Harris he could not drive a stick shift, and in fact he knew how to drive one. Appellant said that if he looked around before stepping outside, it was only to see if he could run away. He was afraid of the consequences if he got caught. He was scared of Harris. Appellant did not want to get in the car but Harris told him to "come on." Harris told Pena to get in the trunk. Harris drove off and stopped at a shopping center. Appellant and Harris did not laugh in the car, and no woman spoke with them. Appellant felt like a hostage.

Harris eventually stopped the car after 15 or 20 minutes and again said, "Come on." They walked to the train station and took the train to Los Angeles. They went to Harris's uncle's house. Appellant decided to stay calm and follow directions. Appellant's brother telephoned the next day and told appellant to come back so he could tell his side of the story. He told appellant to tell Harris to pick up his money.

When Harris and appellant arrived at the station they were arrested. The keys found on appellant were his house keys. The first policeman who questioned appellant was aggressive and angry. Appellant made some false statements to Detective Brien Pogue (Detective Pogue) because he did not want to tell the story and have it get back to Harris. He told the police he kicked Pena while Pena was unconscious. He told the police that Pena left and came back and tried to take a swing at appellant, and Harris went to appellant's defense.

Appellant did not know anything about what Harris had planned that night. Appellant did not go outside willingly. He did not help Harris commit any crimes against Pena.

Harris testified in appellant's behalf after pleading guilty. He said that he told appellant he would buy the second pizza even though he had no money. He went outside with a knife because he was thinking about robbing the pizza man, but he did not tell

appellant about this. Harris telephoned someone while in the hallway. After Pena knocked on the apartment door, Harris put him in a chokehold.

Appellant kicked Harris after Harris wrestled Pena into the apartment. Harris took a cell phone, car key, and cash from Pena's pockets. Harris then became scared and cut Pena's throat and wrist with a knife. Harris plugged in an iron and planned to use it to see if Pena was still alive. Harris then saw that the friend he had telephoned had arrived. Harris wrote gang graffiti on Pena's head with a marker. He then put the hot iron on Pena's stomach as the friend watched. After Pena yelled, Harris told his friend to check on Pena's car.

Harris's friend asked Harris if he could drive a stick shift. Harris said he could, and his friend left. Harris moved the car to the side entrance and went back to the apartment where appellant was putting a towel to Pena's neck. Harris said, "come on," and escorted Pena to his car. Appellant seemed nervous. Harris told Pena that he had been robbed and stabbed by Hispanics. Harris opened the trunk and appellant climbed in.

Harris drove away. He told appellant to get out so that they could go to his uncle's house. Harris never gave Pena's car key to appellant. At his police interview, Harris blamed everything on appellant, but that was untrue.

Lisa Murphy (Murphy), a clinical psychologist, testified as an expert in childhood trauma. She told the jury that a person who has undergone childhood trauma could have both a fight and flight response in a stressful or violent situation. Such persons may adapt by shutting down or being unable to respond. A person who does not react as expected in a stressful situation suffers from a dissociative disorder.

Detective Fournier corroborated the facts surrounding appellant's sister's death. Detective Fournier said that appellant did not display any emotion when he described what he saw his father do.

Rebuttal Evidence

Detective Pogue interviewed appellant. Appellant did not mention his childhood abuse or his father's murder of Wilma. He did not say he was afraid of Harris or that he ran into the bedroom.

During Detective Pogue's interview of Harris, Harris said he was under appellant's control. Harris's statement was more consistent with what Pena told police about the events, except that Harris said appellant did everything.

Dr. Ronald Markman, a psychiatrist, testified about post-traumatic stress disorder (PTSD). People who view traumatic events do not always develop PTSD. There must be an underlying predisposition, such as a genetic or developmental one. It is important to evaluate a person to determine if they have a disorder, otherwise any diagnosis is speculation. A person who suffered from dissociative disorder would not remember the traumatic event. They would not be able to relate the details of the event in sequential order.

DISCUSSION

I. Sufficiency of Evidence of Kidnapping During a Carjacking (Count 6)

A. Appellant's Argument

Appellant contends that his conviction for kidnapping during a carjacking (count 6) must be reversed because kidnapping is a continuous offense, and the initial kidnapping (count 7) was still ongoing when Harris and appellant took Pena's car. According to appellant, the evidence is insufficient to support two convictions for kidnapping.

Appellant also contends that there is no substantial evidence that he committed a kidnapping *during* the commission of a carjacking and in order to *facilitate* the commission of the carjacking in accordance with section 209.5.

B. Relevant Authority

In reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment, presuming in support of the judgment

the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Proctor* (1992) 4 Cal.4th 499, 528.) While a reviewing court "may not 'go beyond inference and into the realm of speculation in order to find support for a judgment'" (*People v. Memro* (1985) 38 Cal.3d 658, 695, disapproved on another point in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2), "[i]f the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Reversal for insufficiency of the evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Simple kidnapping as charged in count 7 is defined in section 207, subdivision (a), which provides: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

Kidnapping in commission of a carjacking as charged in count 6 is defined in section 209.5, subdivision (a), which provides, "Any person who, during the commission of a carjacking and in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole."

Kidnapping is considered a continuing offense: once the forcible movement of a person commences, the kidnapping is ongoing and continues "until such time as the kidnapper releases or otherwise disposes of the victim and has reached a place of temporary safety . . . ." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159; accord, *People v. Palacios* (2007) 41 Cal.4th 720, 726.) In other words, "as long as the detention continues, the crime continues." (*People v. Masten* (1982) 137 Cal.App.3d 579, 588, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.)

C. Count 6 Must Be Reversed

We agree with appellant that, under the circumstances of this case, he cannot be convicted for both simple kidnapping and kidnapping for carjacking. The circumstances also dictate that it is the kidnapping for carjacking conviction that must be reversed.

To be convicted of kidnapping with the intent to commit another crime, the intent must be present when the kidnapping commences. (*People v. Laursen* (1972) 8 Cal.3d 192, 198 ["specific intention" to commit target offense must be "present at the time of the original asportation"].) For example, "[i]f the intent to rob (even though carried out during the course of the kidnapping) is formed after the victim is seized, the offense, insofar as it relates to kidnapping is simple kidnapping and not kidnapping for the purpose of robbery. [Citations.]" (*People v. Bailey* (1974) 38 Cal.App.3d 693, 699); see also *People v. Tribble* (1971) 4 Cal.3d 826, 831–832 ["'kidnapping without intent to rob constitutes kidnapping but not kidnapping for purpose of robbery; and a robbery during a kidnapping where the intent was formed after the asportation is a robbery and not a kidnapping for purposes of robbery'"]; *People v. Shelburne* (1980) 104 Cal.App.3d 737, 742–743 [notwithstanding substantial evidence defendant participated in kidnapping victim and robbing him, there was no credible evidence defendant intended to rob victim when he was taken]; cf. *In re Alvarado* (1972) 27 Cal.App.3d 610, 615 [modifying judgment to substitute simple kidnapping for aggravated kidnapping when intent to rob kidnapped victim was incidental to principal intent to commit sexual offense].)

"Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) In this case, the events leading to the simple kidnapping charge occurred first. Harris's stated intent was robbery. Although the defendants could have been charged with kidnapping for robbery, they were not. Harris testified that he went out into the hallway with a knife after appellant called the Pizza Hut because he was thinking about robbing the pizza man. He later took Pena's car keys, stating at first that he did so because he wanted a means of transportation to Los Angeles, and later, that he merely

wanted to get Pena out of the house. There was no evidence from which the jury could infer that appellant and Harris kidnapped Pena initially in order to take his car. Indeed, they abandoned the car after a short drive.

We also find no reasonable way to separate the continuing offense of kidnapping as it occurred in this case into separate incidents so as to find a simple kidnapping followed by an aggravated kidnapping, as respondent urges. A kidnapping cannot be divided into discrete segments when there is a single abduction and the detention is continuous, as it was here. As the parties have pointed out, in *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1335 (*Thomas*), this court held that a defendant could not be convicted of two counts of kidnapping for robbery despite the People's argument that the original kidnapping for robbery was interrupted by other criminal conduct, and that this conduct caused a termination of the continuing offense of kidnapping.

In *Thomas*, the victim, Jennifer M., was kidnapped at gunpoint as she approached her car in a mall parking structure. The defendant forced her into her car and, as he drove away, asked her how much money she had. After Jennifer M. gave the defendant her wallet with $35, the defendant demanded her automated teller machine (ATM) card. Because she did not have it with her, the defendant drove Jennifer M. toward her apartment so that she could obtain the card. Before arriving, however, the defendant parked the car and repeatedly raped Jennifer M. When they finally arrived at the apartment, Jennifer M. called the police while the defendant waited in the car. (*Thomas*, *supra*, 26 Cal.App.4th at pp. 1331–1332.)

The defendant was convicted of, among other crimes, two counts of kidnapping with intent to commit robbery on the theory that the first kidnapping "began when the [defendant] abducted Jennifer M. at the mall, indicated he wanted money and took her wallet, money and credit cards. . . . [T]his kidnapping ended when he stopped the car, repeatedly raped the victim and forced her to engage in oral sex. [The defendant] committed a second kidnapping . . . when [he] drove Jennifer M. from the location of the

sexual offenses to the Redondo Beach apartment, intending to rob her of her ATM card." (*Thomas, supra,* 26 Cal.App.4th at p. 1334.)

We held that there was "a single abduction, followed by a continuous period of detention." (*Thomas, supra*, 26 Cal.App.4th at p. 1335.) "That [the defendant] may have changed his approach or focus as to the robbery, uttered a variety of threats to the victim, and engaged in other crimes after the initial abduction did not transform the offense into two kidnappings." (*Ibid*.) In the instant case, there is less evidence of a break in the continuous nature of the initial kidnapping than in *Thomas*. Pena's detention was uninterrupted from the time he was hustled inside the apartment to the time he was abandoned in the trunk of his car.

Similarly, in *People v. Jackson* (1998) 66 Cal.App.4th 182 (*Jackson*), the defendant accosted the victim at gunpoint on the steps of her apartment, forced her to walk to her car, and then to her apartment, where he sexually assaulted her. He then asked if she had any money or an ATM card, took her back to her car, and had her drive to an ATM machine to get money. She withdrew cash and gave it to him. He then told her to walk away. (*Id*. at pp. 185–186.) On appeal, the Attorney General argued that, apart from the defendant's separate convictions for kidnapping for purposes of robbery and rape, the evidence supported a third conviction for simple kidnapping based on the defendant's initial act of forcing the victim from the steps of her apartment to her car. (*Id*. at p. 189.) Citing *Thomas*, this court disagreed and reversed the simple kidnapping conviction. The *Jackson* court held that simple kidnapping was necessarily included in the kidnapping for purposes of sexual assault and robbery, and the kidnapping was continuous and could not be subdivided so as to permit multiple convictions. (*Jackson, supra,* at p. 190.)

Respondent, however, proposes a hypothesis under which the jury could have found two kidnappings and emphasizes the concept that reversal is "unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]'" citing *Bolin, supra,* 18 Cal.4th at page 331. Respondent also

emphasizes the proposition that "[i]n reviewing sufficiency of evidence claims, each case of necessity must turn on its own particular facts." (*People v. Smith* (2005) 37 Cal.4th 733, 745 (*Smith*).) Respondent points out that this court's opinion in *Thomas* was published 11 years before *Smith* and nearly four years before *Bolin*. Although we appreciate respondent's guidance regarding review of sufficiency-of-the-evidence claims, we believe it is safe to say that this court was aware of the concept articulated in *Bolin* at the time *Thomas* was published, since the language respondent cites from *Bolin* is a quotation from *People v. Redmond* (1969) 71 Cal.2d 745, 755, and the pertinent language in *Redmond* was not original. (See *People v. Tom Woo* (1919) 181 Cal. 315, 326.) As for the concept that a case must turn on its own particular facts, we were likewise aware of this concept in our analysis in *Thomas*. (See, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 516 [comparison with other cases is of limited utility in deciding claims of insufficient evidence].) We reached our conclusion in *Thomas* based on the facts of that case and then went on to show that our conclusion was supported by other cases that were "analogous and instructive." (*Thomas*, *supra*, 26 Cal.App.4th at p. 1334.) We do the same in the instant case.

Continuing on to respondent's hypothesis, respondent argues that there were two kidnappings in this case, and Harris began the first one when he pushed Pena into the apartment at knifepoint. Respondent points out that the crime of kidnapping continues until the kidnapper releases or disposes of the victim and has reached a place of temporary safety, and the issue of when a crime has ended is a question of fact for the jury. Respondent posits that the jury received sufficient evidence that Pena was not accompanied by either Harris or appellant or both from the time Pena was forced into the apartment until the car was abandoned and Pena escaped. Respondent argues that Harris reached temporary safety in the parking area while Pena was uncontrolled by anyone in the apartment, since appellant testified he was in a bedroom for 15 minutes and Harris was gone when appellant reentered the living room to help Pena. Thus, argues respondent, "both Harris and appellant testified that the first kidnapping ended when

Harris reached temporary safety in the parking area with Pena uncontrolled by anyone in the apartment." According to respondent, Harris began the second kidnapping—the kidnapping for carjacking—when he reentered the apartment, found Pena with appellant and said "come on."

We disagree with respondent. Only Harris's testimony implied there was a period of time—rather brief—when Pena was alone. Harris testified that, when appellant answered Pena's knock at the door, Harris put his arm around Pena's throat, brandished the knife, and forced him into the apartment. Harris noticed appellant was no longer there after Harris had cut Pena on the neck and wrist. After that, Harris went through Pena's pockets and robbed him of items that included Pena's car keys. Harris plugged in the iron, looked out the door, and saw a friend walking down the hallway. The friend watched as Harris wrote on Pena's face with a marker and burned him, but appellant was not in the room. Harris told his friend to go check on Pena's car because Harris wanted to use the car to get back to Los Angeles. Harris then stated that, after his friend left, he got up and walked out to the car. He did not know where appellant was. He moved the car to the side of the apartment with the intent of bringing Pena down to the car so he would not be still in the house. After he pulled the car up to the side entrance, he went back to the apartment. When he opened the door he saw appellant trying to wrap a towel around Pena's neck. Harris told appellant to "come on," grabbed Pena, and walked out the door.

Pena's testimony described no period of time in which he was left unguarded and conscious in the apartment. Pena said that when one of the two men left the other stayed behind and threatened him.

Appellant's testimony implied he came out of the bedroom when Harris went outside. Appellant testified that he ran into his brother's room after he saw Harris cut Pena with a knife. He sat on the floor for 10 or 15 minutes. When the music outside the room stopped, he stepped out of the bedroom. Pena was "just waking up," which meant he had been unconscious up to that point. Appellant knelt and put a towel around Pena's

neck to stop the bleeding. Harris was not there and appellant did not know where he was. After "a few minutes," Harris came back and told appellant to "come on." Harris grabbed Pena, picked him up, and walked to the door.

After examining the testimony, we find respondent's argument unconvincing. Harris testified only that he did not know where appellant was during the time he went downstairs to move Pena's car. Appellant's counsel did not ask Harris whether Pena was conscious when Harris left to move the car. Appellant testified that Pena was not conscious. Pena was just waking up when appellant came out of the bedroom. As the prosecutor pointed out, Harris had no knowledge of what appellant was doing while he was moving the car. Harris testified that appellant was with Pena when Harris returned.

Under these circumstances, it would not be rational to find that Pena was left uncontrolled and that Harris had reached a place of temporary safety when he went to move the car. Harris had not gone outside to terminate the abduction, which is what that phrase implies. Harris went to get appellant's car, and his later actions reveal it was his purpose to get Pena out of the apartment rather than to reach a place of temporary safety. Even if we were to consider the area outside the apartment building (where Harris went to move the car) as a "place of temporary safety," Harris had not released or otherwise disposed of the unconscious victim, and the two conditions are stated in the conjunctive rather than the disjunctive. (See *Barnett*, *supra*, 17 Cal.4th at p. 1159 ["the crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and has reached a place of temporary safety"].) The record is clear that Pena was still detained. Harris himself said that he planned to go back to the apartment and take Pena out.

In sum, when Harris initiated the detention of Pena, his only motivation was to rob him. It was only after that robbery was completed that he formed the intent to use Pena's car. Although there clearly was a carjacking, which may have led the jury to find appellant guilty of kidnapping for the purpose of carjacking, there was only one kidnapping followed by a continuous detention in this case, not two separate kidnappings.

Therefore, the kidnapping for carjacking conviction cannot stand. Given our conclusion, we need not address appellant's related claims that the court erred in giving the instruction on kidnapping during a carjacking in count 6 or that the carjacking and kidnapping counts must be reversed because they are lesser included offenses of count 6.

II. False Imprisonment (Count 8) as Lesser Included Offense of Kidnapping (Count 7)

A. Appellant's Argument

Appellant contends that his conviction for false imprisonment in count 8, a violation of section 236, must be reversed because it is a lesser and necessarily included offense of kidnapping in count 7.

B. Relevant Authority

"To determine whether a lesser offense is necessarily included in a greater charged offense, one of two tests must be met. [Citation.] The 'elements' test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.] The 'accusatory pleading' test is satisfied if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].' [Citation.]" (*People v. Cook* (2001) 91 Cal.App.4th 910, 918; see also *People v. Birks* (1998) 19 Cal.4th 108, 117.)

C. False Imprisonment Conviction Must Be Reversed

In the accusatory pleading, appellant was charged with kidnapping as follows: "On or about September 27, 2003, . . . the crime of kidnapping, in violation of Penal Code section 207(a) . . . was committed by [appellant], . . . who did unlawfully, forcibly and by instilling fear, steal, take, hold, detain and arrest Jorge Pena in Los Angeles County, . . . and did take the said Jorge Pena into another country, state, county and another part of Los Angeles County."

In the same pleading, appellant was charged with false imprisonment by violence as follows: "On or about September 27, 2003, . . . the crime of false imprisonment by violence, in violation of Penal Code section 236 . . . was committed by [appellant] . . . , who did unlawfully violate the personal liberty of Jorge Pena, said violation being effected by violence, menace, fraud, and deceit."

As the jury was instructed, the elements of kidnapping are: "1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; and 3. The other person did not consent to the movement."

The jury was instructed that, in order to find appellant guilty of false imprisonment by violence or menace it must find that "1. The defendant intentionally and unlawfully restrained, or confined, or detained someone, or caused that person to be restrained, or confined, or detained by violence or menace; and 2. The defendant made the other person stay or go somewhere against that person's will."

We believe that, in accordance with both tests, and clearly under the elements test as explained to the jury and under the circumstances of this case, the offense of false imprisonment by violence is a lesser included offense of kidnapping.

As we have previously indicated, we disagree with respondent's argument, which is repeated on this issue, that there was sufficient proof that a simple kidnapping ended after Harris went to move Pena's car and left Pena "uncontrolled" in the living room. Respondent asserts that the jury received sufficient evidence to find appellant guilty of false imprisonment by violence solely for the act of forcing Pena into the car trunk after the simple kidnapping ended. We disagree and conclude that under any interpretation of the facts, the crime of false imprisonment was a lesser included offense of kidnapping. In Pena's ordeal the same acts formed the basis of both the false imprisonment and the kidnapping charges. On this issue, as in the previous one, we do not agree with respondent's effort to separate Pena's detention into separate phases so as to find separate

acts by the perpetrators. In *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820–821 (*Ratcliffe*), for example, the false imprisonment was found to be the same act as the kidnapping because both the false imprisonment and kidnapping counts related to the same act or acts. In *Ratcliffe*, the defendant forcibly kidnapped the victim from her apartment and took her to his own, threatened her with a bat and demanded money, terrorized her with a knife after tying her to a bed, raped her, forced her into oral copulation, and made her drink Clorox and take pills. (*Id*. at p. 814.) "He who kidnaps a victim does so in order to restrain the personal liberty of the victim . . . whatever his purpose may be for the false imprisonment (to rape, rob, to obtain ransom, etc.)." (*Id*. at p. 821.)

The false imprisonment was an intrinsic part of the act of kidnapping in this case. There was no separate conduct compelling a finding of a separate offense of false imprisonment. As a result of our conclusion, the conviction in count 8 must be reversed. Multiple convictions cannot be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

III. Jury Instruction on Mayhem

A. Appellant's Argument

Appellant contends that, although appellant was charged with aggravated mayhem in violation of section 205, the trial court erroneously blended the elements of aggravated mayhem and simple mayhem in its jury instructions.[3] As a result, the prosecution's

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[3] Section 203, defining simple mayhem, provides: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Section 205 provides: "A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an

burden of proof was lessened, and appellant was denied due process and a fair trial. Appellant claims that reversal of the mayhem count (count 2) is required.

B. Proceedings Below

The trial court read the jury instruction for aggravated mayhem, CALCRIM No. 800, as follows: "The defendant is charged in count 2 with aggravated mayhem. To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant unlawfully and maliciously disabled or disfigured someone permanently; 2. When the defendant acted, he *intended* to permanently disable or disfigure the other person; and 3. Under the circumstances, the defendant's act showed extreme indifference to this physical or psychological well-being of the other person. [¶] Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to annoy or injure someone else. [¶] A disfiguring injury may be permanent even if it can be repaired by medical procedures. The defendant—the People do not have to prove that the defendant intended to kill." (Italics added.)

The trial court then read CALCRIM No. 801 as follows: "To be guilty—to prove that the defendant is guilty of mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously permanently disfigured someone. [¶] Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to annoy or injure someone else. [¶] A serious bodily injury means a serious impairment of physical condition. Such an injury may include, but is not limited to, a wound requiring extensive suturing and/or serious disfigurement. A disfiguring injury may be permanent even if it can be repaired by medical procedures."

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intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole."

C. Relevant Authority

When a criminal defendant contends an ambiguous or potentially misleading instruction violated his or her federal constitutional right to a trial by jury, an appellate court must review the instructions as a whole and determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; see also *Jones v. United States* (1999) 527 U.S. 373, 390; *People v. Smithey* (1999) 20 Cal.4th 936, 963; *People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) If an instruction omits or improperly describes an element of the offense, preventing the jury from making a necessary factual finding, it is constitutionally defective and subject to the *Chapman*[4] standard of review on direct appeal. (*People v. Williams* (2001) 26 Cal.4th 779, 790.)

D. No Error in Jury Instructions on Mayhem

There is no reasonable likelihood the jury understood the instructions on aggravated mayhem and mayhem as one instruction with blended elements. The trial court read the instructions almost word for word. The instruction for aggravated mayhem contained the element of specific intent.

The trial court told the jury, "You're going to have a copy of these instructions in the jury room, so don't worry about taking down too many details. Just listen to them, and when you get back into the jury room, you'll have them in front of you, and you can go through the elements one at a time. It's too much for you to remember off the top of your head or to take down in notes."

We are confident the jury did not remember the trial court's reading of the two instructions in succession. Any confusion would have been remedied when the jury saw the two instructions in black and white and considered them during deliberations.

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4 *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

IV. Prosecutorial Misconduct in Closing Argument

A. Appellant's Argument

Appellant claims the prosecutor committed incurable misconduct during closing argument, rendering appellant's trial fundamentally unfair. Specifically, on four separate occasions, the prosecutor argued that appellant waited five years before coming forward with his defense story. In addition, the prosecutor falsely argued to the jury that Harris had nothing to lose because he had already been sentenced in this case, and therefore his trial testimony should be disbelieved. Although the trial court agreed with defense counsel and admonished the jury, the admonition was insufficient to cure the prejudice, and reversal is required.

B. Proceedings Below

The prosecutor discussed appellant's claim of innocence based on his childhood trauma and his fear of Harris and stated, "But any reasonable person, any one of you, in the defendant's situation would have told the police immediately. . . . And a reasonable person wouldn't have waited five years to then tell the truth. None of you in the defendant's position would have waited five years to then tell the truth about what really happened."

Defense counsel objected, and the trial court overruled the improper-argument objection. The prosecutor went on to say "Did he tell the police? Did he tell the detective six months later, what the truth was? No. He waits five years later to now tell us what this truth is." And, "Instead of telling Detective Pogue what the truth was, he decided he was going to lie to him and then wait five years later to then tell the truth. Reasonable? No." In discussing appellant's statement to police, the prosecutor said, "This is a statement that he made the very next day, after this all happened. Not five years later, when he's had time to think about all this."

Further along in his argument, the prosecutor sought to discredit Harris's testimony. The prosecutor stated, "And then we have Mr. Harris who has already pled, who already admitted to the charges, and who's got nothing to lose. He's already been

sentenced. So he can come in and say whatever he wants." The trial court sustained the defense improper-argument objection.

Defense counsel moved for a mistrial based upon prosecutorial misconduct. She cited the prosecutor's repetition of the statement that appellant had waited five years to make his claims. Appellant had testified in March 2006 and given the same story, which was only three years after the crimes. Additionally, Harris had not been sentenced and the prosecutor was aware of it. Both misstatements had misled the jury and led to an unfair trial. Upon questioning by the trial court, the prosecutor admitted he had not read appellant's testimony from 2006.

The trial court agreed that there was misconduct and that it was misleading, but the trial court believed it could be cured. It would tell the jury to disregard the argument in its entirety and tell them it was improper. The trial court noted that the statement regarding Harris was misleading because the court had intentionally continued Harris's sentencing so that Harris would have something to lose. The trial court said it would tell the jury that the prosecutor's argument was factually incorrect and that they should disregard it. The trial court did not believe there were grounds for a mistrial.

After the defense attorney completed her argument, the trial court told the jury, "Ladies and Gentlemen, there were two statements that were made during the argument by [the prosecutor] in his opening argument, and I want to address both of them. One statement was or argument was to the effect that [the defendant] had waited five years to tell anybody about the story that he told here in court. That is an improper argument, and I'm going to admonish you to disregard that statement, and to not consider it in any way. The second is that he also made an argument that Mr. Harris has already been sentenced and therefore has nothing to lose. That also was an improper argument. I'm going to admonish you to disregard that argument, not consider the argument itself or the facts stated in the argument, unless you believe it's supported by the evidence, but to disregard the argument."

C. Relevant Authority

When a claim of prosecutorial misconduct "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "[W]e 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

Even if a defendant shows that prosecutorial misconduct occurred, reversal is not required unless the defendant can demonstrate that a result more favorable to him would have occurred absent the misconduct or with a curative admonition. (*People v. Arias* (1996) 13 Cal.4th 92, 161.) In determining the existence of prejudice, a reviewing court may consider the curative effect of any admonition or instruction given to the jury. (*People v. Ryan* (1981) 116 Cal.App.3d 168, 184.) The adequacy of a curative instruction is judged by whether it fully counteracted whatever prejudice may have resulted from the prosecutor's actions. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 215–216, fn. 5.) If the admonition given is adequate, it ordinarily will be presumed the jury followed it and the error was cured. (*People v. Beach* (1983) 147 Cal.App.3d 612, 629.)

D. Admonitions Sufficient to Cure Any Prejudice

"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985–986.) We see no reason why the admonition given here would not have been adequate. Accordingly, appellant's contention must be rejected.

Appellant specifically argues that the admonitions were not worded sharply enough and were vague. He also claims the admonition about the five years misstatement came too late. The admonition regarding Harris was also not worded

strongly enough and was confusing. According to appellant, his was a very close case, as shown by the length of deliberations (over a day) and his acquittals of attempted murder and torture. Appellant's credibility concerning his mental state was the central issue in this case, and the prosecutor's remarks undermined appellant's entire defense.

We disagree. Clearly, if appellant's credibility had been irrevocably damaged, the jury would not have acquitted him of attempted murder and torture. In addition, the deliberations were not lengthy considering the number of counts with which appellant was charged. The jury began deliberations at 11:05 a.m. on the first day and ended at 4:10 p.m. with a break of one and one-half hours. At the next session, the jurors began deliberations at 9:35 a.m. and reached a verdict at 10:55 a.m.

Moreover, the trial court was very precise in telling the jurors which remarks by the prosecution they were to disregard. The California Supreme Court has consistently stated that on appeal the jury is presumed capable of following the instructions given. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband* (1996) 13 Cal.4th 622, 714.) Courts have noted on several occasions that jurors are intelligent beings, capable of understanding the court's instructions. (See *People v. Lewis* (2001) 26 Cal.4th 334, 390.) "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have.' [Citations.]" (*People v. Fitzgerald* (1972) 29 Cal.App.3d 296, 312.) In our view, the admonition quoted *ante* had precisely that impact.

Furthermore, the fact that appellant had actually testified to the same version of events once before does not alter the fact that appellant told a different story to police immediately after his and Harris's arrests. It was clear to the jury that in 2003 appellant lied to police instead of explaining his fears that he related on the stand. As for Harris's credibility, his testimony was also glaringly inconsistent with his original statement to police.

Accordingly, we must reject appellant's claim. Any misconduct on the part of the prosecution was adequately addressed by the court's admonition. Appellant suffered no prejudice from the prosecutor's remarks. The improper arguments about which appellant complains did not infect the jury deliberations to the degree that appellant's trial was fundamentally unfair.

V. Presence of Sheriff's Deputy During Appellant's Testimony

A. Appellant's Argument

Appellant contends the trial court abused its discretion by merely deferring to the bailiff the decision as to whether an armed deputy should stand between appellant and the jury during appellant's testimony. Had the trial court exercised its discretion, it is reasonably likely the court would have concluded that no armed guard was necessary. The record reveals nothing to indicate that appellant was a flight risk or that he posed a threat to courtroom security. The security measure undermined appellant's presumption of innocence and his right to a fair trial, requiring reversal.

B. Proceedings Below

At the beginning of appellant's testimony, defense counsel approached the bench, and the following exchange occurred:

"MS. THELAN: Your honor, I would object to the deputy standing between Mr. Young and the jury as he is doing Andrew is sitting [*sic*]. I was not aware that that was going to happen. I think it's extremely prejudicial because the message that it sends is somehow Mr. Young is to be feared by these people and they need to be protected by this bailiff. He has never been anywhere near the jury in any other witness's testimony. I think it's highly inappropriate at this point, and it's causing undue prejudice to Mr. Young, and it's a violation of both due process and equal protection."

"THE COURT: You're referring to the deputy that is standing by the flag at the end of the jury box?

"MS. THELAN: I'm referring to the deputy, yes, who followed Mr. Young to the witness stand, and who is now in between him and the jury.

"THE COURT: So you are requesting that no deputy stand between him and the doorway while he testifies?

"MS. THELAN: Well, your Honor, I don't have a problem if the deputy, if he wants to stand outside the doorway or if that doorway somehow needs to be locked. It's not the doorway exiting through the public entrance; it's a private area that goes into the back doors of this building.

"THE COURT: Including the judges' chambers and jury room.

"MS. THELAN: That's correct. And I will indicate that in no prior occasions has this ever occurred. Mr. Young testified previously at his initial trial and he testified for approximately two days without a deputy needing to be in that location. So I think it's inappropriate at this time.

"THE COURT: All right. The objection is noted but overruled. I'll leave it to the deputies to provide courtroom security as they see fit. I'll admonish the jury to disregard it if you want me to. I don't know whether you want me to call attention to it, but I will talk to them about it and tell them that they're just doing what's required of them, that it's not a reflection of Mr. Young. Would you like me to do that?

"MS. THELAN: Yes. Yes, I would.

"THE COURT: I'll be happy to do that."

The trial court then addressed the jury as follows: "All right. Before Ms. Thelan begins her direct examination, I do want to caution you not to infer anything at all from the fact that there's a bailiff standing over to the side of Mr. Young. They're doing what they're required to do by their boss when somebody testifies. It's not a reflection of Mr. Young. It's not a reflection on any perceived security threat that the bailiffs have. That's where he is supposed to be stationed when any witness who is charged with a criminal offense testifies, and that's why he is standing there. If it means anything to you at all, disregard it, just listen to what Mr. Young has to say and give him the same benefit of your consideration as any other witness."

C. Relevant Authority

Both the United States Supreme Court and the California Supreme Court have distinguished "between security measures, such as shackling, that reflect on defendant's culpability or violent propensities, and other, more neutral precautions." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 996, citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 567–568; see also, e.g., *People v. Marks* (2003) 31 Cal.4th 197, 223–224 [maintaining "distinction between shackling and the deployment of security personnel" in the courtroom]; *People v. Stevens* (2009) 47 Cal.4th 625, 634 (*Stevens*) [distinguishing between "physical restraints placed on the defendant's person" and "most other security practices"].)

A trial court's decision regarding courtroom security measures is reviewed under an abuse of discretion standard. (*Stevens*, *supra*, 47 Cal.4th 625, 637; *People v. Ayala* (2000) 23 Cal.4th 225, 253.) The trial court retains broad power to maintain an orderly and secure courtroom. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269 (*Hayes*).)

The issue of whether security measures are so prejudicial so as to deny a defendant the right to a fair trial must be determined on a case-by-case basis. (*Hayes*, *supra*, 21 Cal.4th at p. 1269.) As a reviewing court, we must determine whether the security practices presented an "'unacceptable risk'" that impermissible factors came into play. (*Ibid.*) A court should consider what the jurors saw and determine whether the courtroom scene was so inherently prejudicial that it posed an unacceptable threat to a defendant's right to a fair trial. If the security measure is not found inherently prejudicial, and if the defendant cannot show actual prejudice, no further analysis is required. (*Ibid.*)

D. No Abuse of Discretion or Prejudice

In *Stevens*, the California Supreme Court held that the trial court's decision to place a deputy near a testifying defendant is not akin to a "'human shackle'" and that such a security measure "is not an inherently prejudicial practice that must be justified by a showing of manifest need." (*Stevens*, *supra*, 47 Cal.4th at p. 629; see also pp. 634–637.) The court explained that "so long as the deputy maintains a respectful distance

from the defendant and does not behave in a manner that distracts from, or appears to comment on, the defendant's testimony, a court's decision to permit a deputy's presence near the defendant at the witness stand is consistent with the decorum of courtroom proceedings." (*Id*. at p. 639, fn. omitted.)

As stated in *Hayes*, "'The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence. While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. . . . Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.'" (*Hayes, supra,* 21 Cal.4th at p. 1268.)

We believe this is sound reasoning and that the jurors would not have drawn any adverse inference from the bailiff standing near appellant during his testimony. Furthermore, in this case, the trial court admonished the jurors that the practice was routine and that it was to draw no negative inferences about appellant due to the location of the deputy.

It is true that the trial court did not explain its decision, and appellant argues that the court here abused its discretion by merely deferring to the bailiff as to whether a deputy should stand beside appellant during his testimony. Stevens reiterated that "[t]he court may not defer decisionmaking authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate." (*Stevens, supra*, 47 Cal.4th at p. 642.) "The trial court should state its reasons for

stationing a guard at or near the witness stand and explain on the record why the need for this security measure outweighs potential prejudice to the testifying defendant. In addition, although we impose no sua sponte duty for it to do so, the court should consider, upon request, giving a cautionary instruction, either at the time of the defendant's testimony or with closing instructions, telling the jury to disregard security measures related to the defendant's custodial status." (*Ibid*.)

In *Stevens*, when defense counsel protested the presence of the deputy at the witness stand, the trial court "observed that a deputy had been 'sitting right behind' defendant 'throughout the entire trial,' and the court reasoned, 'Having a deputy in, basically, the same proximity . . . will be no more prejudicial.' The court remarked that 'the Alameda County Sheriff's Department policy of having a deputy at the stand with an in-custody [defendant] for safety purposes, or even to prevent escape, is certainly reasonable,' and stated it did not want jurors to be distracted by safety concerns." (*Stevens*, *supra*, 47 Cal.4th at pp. 631–632.) Stevens stated that although "[t]he record in this case could be clearer, . . . it demonstrates that the trial court came to its own conclusion about the stationing of the deputy and did not abdicate control to law enforcement." (*Id*. at p. 642.) In the instant case, although the trial court said it would allow the deputies to provide security as they saw fit, the court's response to defense counsel indicated that it could see the need for a deputy to stand near the door next to the witness stand, which led to the judges' chambers and jury room. We do not believe the trial court abused its discretion.

Finally, by its verdicts in this case, the jury demonstrated that the security measures did not undermine its ability to be impartial. (*Stevens*, *supra*, 47 Cal.4th at p. 629 [defendant must show "actual" as opposed to presumed prejudice].) The jury acquitted appellant of two of the most serious charges he faced. Given the verdicts, we can confidently say that the bailiff's presence near appellant during his testimony was not so inherently prejudicial that it impermissibly affected appellant's right to a fair trial.

VI. Presentence Custody Credits

A. Appellant's Argument

Appellant asserts he is entitled to one day of presentence credit for every day he actually spent in custody, including the date of sentencing. He was arrested on September 28, 2003, and sentenced on February 9, 2009. Appellant also states that he is entitled to 15 percent credit on his custody days. Appellant is correct. (*People v. Cooper* (2002) 27 Cal.4th 38, 40; *People v. Nunez* (2008) 167 Cal.App.4th 761, 764; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Smith* (1989) 211 Cal.App.3d 523, 525–527.)

Appellant received only 1,952 days of actual custody credits. He contends he was entitled to 1,962 days of actual credit as well as the 15 percent additional credits under section 2933.1. Respondent contends that the matter should be remanded for the limited purpose of determining the additional number of credit days, if any.

Appellant is correct that he was entitled to 1,962 days of presentence conduct credit, which includes his day of arrest and sentencing. Section 2933.1, subdivision (a) provides that a person who is convicted of a felony offense listed in section 667.5, subdivision (c), which includes mayhem and kidnapping, shall accrue no more than 15 percent of work time credit, and subdivision (c) provides that such a person shall receive a maximum of 15 percent of the actual period of confinement prior to placement with the Department of Corrections. Fifteen percent of 1,962 custody days amounts to 294 additional days. Therefore, upon resentencing, appellant should be granted 2,256 total presentence credit days instead of the 2,244 days he received at his initial sentencing.

DISPOSITION

The judgments in counts 6 and 8 are reversed. In all other respects, the judgments are affirmed. The matter is remanded for resentencing. The superior court is directed to forward an amended copy of the abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST